CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

December 1, 2005

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (Commission) to order at 10:04a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Sheridan Downey, Eugene Huguenin, and Ray Remy were present.

Item #1. Public Comment.

There was none.

Consent Items #2-7.

Chairman Randolph pulled Item #3, In the Matter of No on Knight-No on Prop 22 and Cary Davidson, FPPC No. 02/170, and asked if there were any other items to be pulled.

There were none.

Commissioner Downey moved to approve the following items in unison:

Item #2. Approval of the November 3, 2005, Commission Meeting Minutes.

Item #4. In the Matter of Harvey Ryan, FPPC No. 05-0538 (1 count).

Item #5. In the matter of Jeffrey Sterman, FPPC No. 05-046 (1 count).

Item #6. Failure to Timely File Major Donor Campaign Statements:

- **a. In the Matter of A. William Allen, III, FPPC No. 05-0547** (1 count).
- **b. In the Matter of Robert D. Basham, FPPC No. 05-0549** (1 count).
- **c. In the Matter of The Kick Law Firm, APC, FPPC No. 05-0552** (1 count).

Item #7. Failure to Timely File Late Contribution Reports – Proactive Program:

- **a. In the Matter of Ace Parking Management, Inc., FPPC No. 05- 0553** (1 count).
- **b. In the Matter of Albertson's, Inc., FPPC No. 05-0554.** (1 count).

c. **In the Matter of Berman, DeValerio, Pease, Tabacco, Burt & Pucillo, FPPC No. 05-0556** (1 count).

d. **In the Matter of Casey, Gerry, Reed & Schenk, FPPC No. 05-0557** (1 count).

e. **In the Matter of Ganong & Wyatt, LLP, FPPC No. 05-0558** (1 count).

f. **In the Matter of Levin, Simes & Kaiser, FPPC No. 05-0563** (1 count).

g. **In the Matter of Lexington Law Group, LLP, FPPC No. 05-0564** (2 counts).

h. **In the Matter of Milberg, Weiss, Bershad & Schulman, LLP, FPPC No. 05-0566** (1 count).

i. **In the Matter of Paycom.net, LLC, FPPC No. 05-0570** (1 count).

j. **In the Matter of Sierra Tel Communications Group, FPPC No. 05-0573** (1 count).

k. **In the Matter of Stars Behavioral Health Group, FPPC No. 05-0574** (1 count).

l. **In the Matter of Whatley Drake, LLC, FPPC No. 05-0578** (2 counts).

Commissioner Remy seconded the motion. Commissioners Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 4-0 vote.

ITEM REMOVED FROM CONSENT

Item #3. In the Matter of No on Knight-No on Prop 22 and Cary Davidson, FPPC No. 02/170.

Chairman Randolph abstained from this item because she was a contributor to the committee.

Commissioner Huguenin moved to approve the stipulation. Commissioner Remy seconded the motion. Commissioners Downey, Huguenin, and Remy supported the motion, which carried with a 3-0 vote.

ACTION ITEMS

Item #8. Pre-notice Discussion of Proposed Regulation 18534 – Expenditures in Support of or Opposition to Candidates for State Elective Office, and Accounts.

Senior Commission Counsel Scott Tocher explained that section 85303 is one of the components of Proposition 34's contribution limit scheme that was adopted by the voters in 2000. Subdivisions (a) and (b) set up contribution limits to committees, when those committees will be using the contributions received to make further contributions to candidates. Specifically, subdivision (b) limits contributions to political parties to $25,000 when those contributions are going to be used to make contributions to candidates. Subdivision (a) applies to all other committees, with the exception of small contributor committees. These limits have since been adjusted due to inflation but for ease of discussion, the limits that are referred to in the statutes will be used in this explanation. What the corollary of these statutes means is that contributions to these committees are unlimited if the contributions received are used for purposes other than making contributions to candidates for elective state office. Therefore it is critical to enforcement of the limits in section 85303 that the nature of contributions received by these committees is preserved and can be identified. As a result of the events described in the memo regarding 21st Century during the November 2002 election, the Enforcement division identified during its investigation two important needs that the Commission should address in order to maintain the integrity of section 85303's limits.

Commissioner Blair arrived at the meeting.

Mr. Tocher continued with the first need for the Commission to address, which is a need for committees that receive contributions that are in excess of the limits in these sections to set up two different accounts, one account for making those contributions and the other account for all other purposes, such as get out the vote, party building activities, independent expenditures, and the like. The second need is to ensure that there is no cleansing of funds in excess of the contribution limit. Therefore, if a committee receives funds that are in excess of the limit for contributions for candidates, those funds could only be used for non-candidate support activities. Those are the two primary areas that the regulation draft seeks to address.

Mr. Tocher explained that the limits in section 85303 apply only if the contributions received are used to make contributions to candidates. If not, there is no limit on the contribution to that committee. As a result, the regulation begins by defining what is meant by candidate support versus non-candidate support activities. There was some discussion during the drafting as to the proper terms. The term "candidate support" applies to contributions that are used to make contributions to candidates for elected state office and "non-candidate support" means all other expenditures. That is subdivision (a).

Mr. Tocher went on to subdivision (b), tracking a committee's expenditures of funds to discern whether contributions exceeding the limits have been used to make contributions to candidates is a problem if all the funds are commingled into a single account. As a result, under subdivision (b), the regulation requires a committee two open to accounts if two conditions are met. One, if the committee receives contributions from individuals that are over the limit that it could use to make contributions to candidates. The second condition is that they, in fact, make contributions to candidates, or wish to do so. In that event, this subdivision requires a committee to open up a

"candidate support" account and a "non-candidate support" account, and requires those accounts to be identified accordingly.

Mr. Tocher moved on to subdivision (c), which builds on subdivision (b). Once the two accounts are created, subdivision (c) requires that if over-the-limit contributions are received they must be deposited first into the "non-candidate support" account. The committee then has fourteen days to transfer any funds from that contribution into the candidate support account up to appropriate limit. The authority for this provision is subdivision (c) of section 85303, which allows committees to accept contributions over the limit, so long as they are used for "non-candidate support" purposes.

Mr. Tocher continued with subdivision (d), addressing earmarked contributions and the rule that if a committee receives an earmarked contribution the committee must follow the earmarking instructions to an extent. If the funds are earmarked for "non-candidate support" purposes, then the committee deposits the contribution into the" non-candidate support" account. If, however, the earmark is for "candidate support" purposes and it is in excess of the limits that are applicable under subdivisions (a) and (b), then the contribution must be returned.

Mr. Tocher explained that subdivision (e) then completes the circle by stating the rule that any contribution to a candidate must come from a committees "candidate support" account or the corollary that no contribution to a candidate for elected state office may be made from a committee's "non-candidate support" account. A committee is subject to this regulation if it receives over the limit funds and if it wishes to make contributions to candidates for elected state office. If those conditions are not met, then the regulation's provisions would not apply. Mr. Tocher reiterated that in the event that a committee does meet those conditions, they are required to set up two different accounts and all contributions to candidates must come from the "candidate support" account. In this way, all funds are tracked and it is far easier after the fact to determine whether unintentional or intentional violations of the contribution limits have occurred.

Mr. Tocher went on to subdivision (f) which addresses an issue that arises specifically from the events described in the memo and states the rules that govern transfers between the two accounts. It states that funds can be transferred from the "candidate support" account to the "non-candidate support" account, but in doing so, it does not permit the candidate support account to receive another contribution from the contributor. Regarding transfers from the "non-candidate support" account, which is unlimited, to the limited "candidate support" account; that is only allowed as under subdivision (c).

Mr. Tocher moved on to subdivision (g) which addresses the issue of contributions from committees with "non-candidate" and "candidate support" accounts. It would prohibit committees from making contributions from their "non-candidate support" account into the "candidate support" account of other committees and also would prohibit other parties from receiving such contributions. It requires that any transfers or contributions include notice to the recipient as to the nature of the funds. A check with the proper designation of the account title on it is adequate notification to the recipient committee.

Chairman Randolph asked for an explanation of how subdivision (g) would work in the real world and if any committee would now be required to have two accounts.

Mr. Tocher replied that although that was not the intention of the regulation, in reality, as it is currently drafted, that would be the case. There is no explicit requirement that a committee set up two accounts. If it is going to receive under limit contributions then it will never be an issue that they could possibly be making contributions to candidates in violation of those limits. Therefore, smaller committees should be able to operate without the burden of this regulation. As a practical matter, there could be circumstances where the committee might be forced to do so if it was going to receive a contribution from another committee that does have the two accounts. By virtue of the language in subdivision (g), which prohibits contributions from a "non-candidate support" account into another committee's "candidate support" account, it appears as though one reading of the language could require that the committee to have to set up the two accounts, even if the contribution is under the limit.

Chairman Randolph said that is a concern.

John Appelbaum, Chief of Enforcement, addressed the Commission on the Enforcement Division's stance on the issue and why it is significant. The goal is to try and keep the characterization of the money to meet and conform to the Political Reform Act. The problem that presents itself is that as money gets transferred from committee to committee, the Commission would like to avoid losing that characterization and thereby circumvent the contribution limits. So if one committee gives money from "non-candidate support" funds to another committee, and if that second committee takes those funds and uses them for "candidate support" purposes, there is public harm. There is an original donor who has given money, that money is shuffled to different committees and the public is not aware of the original donor of that money. That is the kind of public harm that staff is trying to avoid.

Chairman Randolph asked if there was public harm even if the latter transfers are within the limits.

Mr. Appelbaum replied that there is public harm to the degree that money that was originally designated for non-candidate support is subsequently transferred and used by another committee for "candidate support." The public may not realize that the money has changed character and now is being used for "candidate support" and would not see the true donor of the funds.

Commissioner Downey sought to clarify by example that a donor who might contribute $50,000 to a specific committee and designate, due to the limits, $25,000 for "candidate support" and $25,000 for "non-candidate support." That committee could then take the $25,000 for "non-candidate support" and dole it out to local central committees and that money could end up in "candidate support" funds. The original donor has then technically donated all $50,000 to "candidate support" and that is the concern of the Commission.

Mr. Appelbaum agreed that is one of the concerns but added that there are others. The possibility that the contribution limits can be avoided by certain committees is an issue but a greater public harm from the Enforcement Division's perspective is that there is nothing stopping

committees from moving the original contributions from committee to committee and those committees using portions for "candidate support" and "non-candidate support." The original donor of the funds is not made clear to the public without a large amount of research. The more the money is channeled, the more difficult it gets to distinguish its origination.

Commissioner Downey agreed with the Chairman that public comment on this issue would be helpful.

Chairman Randolph asked for any other questions before the issue is opened to public comment.

Commissioner Huguenin addressed the language in subdivision (b) on line fourteen. Due to the way the preceding sentence is structured, it is not clear that the designation needs to be on the check. It may be better if those two sentences were drawn more parallel in their structure so that it is clear that not only the account title but the purpose, candidate or non-candidate, needs to be on the check itself.

Chairman Randolph opened the discussion to public comment.

April Boling, treasurer for the San Diego County Republican Party addressed the Commission regarding the need for two accounts and proposed some questions to staff in order to understand how the process of utilizing the two accounts would work. After giving examples of situations where the requirement of having two accounts may cause unnecessary hardship on certain small committees, Ms. Boling suggested that the system of accounts be set up so that it still accomplishes the public objective of making sure that money that came in in excess of the limits is not used for state elective office candidate support, but there would be fewer transfers and complexity.

Mr. Tocher responded that staff had discussed the same issue while trying to surmise which account would be the default account. The state elective office candidate account would be the default account.

Ms. Boling interjected that the account would simply be the "general" account.

Mr. Tocher agreed, adding that staff had a similar system drafted at one point but the questions arose about what would be done with contributions that may come in that might sit in the account for a period of time and would be in excess of the limits. The issue became a tracking issue. It is possible to divide a check upon deposit so that the amount never exceeds the limits.

Commissioner Downey reiterated that the original assumption was that if a $30,000 check is received, it would have to be deposited in one account, thus exceeding the limit. What is being suggested now is that at the time of deposit, the checks can be split among more than one account.

Commissioner Huguenin suggested that that practice may make the work of the auditors difficult when trying to figure out where the money went exactly.

Ms. Boling responded that the deposit slips have both account numbers on them and a copy of the slip is put in each file.

Mr. Appelbaum stated that problem with this system is one of uniformity whereas every committee may do things differently. There would have to be some checking done as to whether banks will complete such a transaction. From an auditing stand point the difficulty is in tracking the check.

Chairman Randolph suggested that the requirement be that there must be records of all transaction from the original deposit, which committees have to do already.

Mr. Appelbaum said that what the objective had been was to give the treasurers more flexibility.

Ms. Boling replied that either way it is done will work, and the bigger question is regarding which account will be the default account. By having the state elected candidate account as the general account it would avoid having to deal with all the smaller issues.

Ms. Wardlow explained that under the current regulation one can pay anything out of the candidate account. One would not have to transfer money over to the non-candidate account in order to pay the rent. Whatever money is in your general account can be used to pay for anything. If no contributions over the limits are received, that account will always be sufficient.

Commissioner Downey asked if the second account had to be kept open once the money is spent down.

Ms. Wardlow replied that there is nothing in the regulation that says the account has to be maintained once there are no longer any candidate funds.

Ms. Boling read an example from the memo that states that all other expenditures must come from the second account.

Chairman Randolph explained that, although it is written that way, that was not the intention and the language can be changed to clearly explain the requirement.

Ms. Wardlow agreed with Ms. Boling and explained that everyone seems to be suggesting the same thing and it makes sense to change the wording.

Ms. Boling expressed concern with the labeling of the accounts being confusing and questionable. Calling the two accounts simply, Account 1 and Account 2 was suggested as an easy way to keep things clear.

Chairman Randolph confirmed that the suggestion is that instead of having examples of account labels, there are just two accounts labels that everyone must use.

Ms. Boling agreed that two designated labels would be best. The accounts should also be labeled what they are for to avoid confusion with other committees.

Chairman Randolph thanked Ms. Boling and asked for any other comments.

Chuck Bell, of Bell, McAndrews and Hiltachk for the California Republican Party addressed the commission and praised the staff presentation on this issue. Mr. Bell expressed much agreement with Ms. Boling's comments as well. If a party committee starts out with two accounts, it may be less of a problem. However, smaller committees that start out with one account will face a dilemma when it receives a larger contribution. Regarding the approach that is taken in the draft, the California Republican Party is supportive of that and, in fact, had suggested it because it followed protocols that the state party had been using since the onset of Prop 34. Some of the local committees were not fully aware of its complexity of it and the 21st Century problem largely resulted from unfamiliarity with that complexity.

Mr. Bell made a second point addressing subdivision (g) saying that it was not clear from Prop 34 that the section 85303(c) money, the unlimited money, could not be used by a party committee to make a contribution to another party committee that could then be used for candidate support. There is a problem if the intent is to move that money in a way that would create candidate support money out of what had been non-candidate support money, but it is not clear that the statute supports that position. The best way to redraft this regulation is to structure it with flexibility so that there is not just one iron clad system.

Stephen Kaufman, of Kaufman Downing, echoed the comments of Mr. Bell and stated that Ms. Boling's comments were extremely well taken. The goal of the regulation is good but there is concern with the naming of the accounts, particularly as it relates to decision point (g) and as it relates to non-political party committees that do not raise money in excess of the limit. The right approach in trying to work through the regulation might be to create a presumption that a committee that has a bank account; that account is the permissible spending fund and the candidate support account in the absence of a second account. The focus would be on naming the second account that is the non-state elective candidate support fund so that if money is transferred between committees, (unless there is an indicator otherwise on the check,) the presumption would be that the money is candidate support money. That eliminates the naming issue and does not put any obligation on the majority of committees who only need one account.

Chairman Randolph replied that the intent had been to have the two account rule only apply to committees that take contributions in excess of limits, it may be just a matter of clarifying that.

Commissioner Downey confirmed with Mr. Kaufman that the concern with subdivision (g) is the confusion with the language, not with its existence.

Mr. Kaufman explained that there are two concerns. The first concern echoes Mr. Bell, that the statute does not necessarily prohibit those transactions. The second concern is with the requirement of having to name both accounts and not just the overflow account.

Mr. Appelbaum added that there is an additional issue about contribution limits in that if the character of the money is lost due to transfers there would be far more money going to candidate support than the public would realize and the original donor's name drops off.

Commissioner Huguenin gave the scenario of contributions that explained that once the money becomes state party money, Prop 34 does not care where is came from in terms of what is done with it. It seems that the attempt is to track this more closely than necessary.

Mr. Tocher responded that staff debated this issue as well but it was decided that the distinction is drawn where, generally, individuals are not in the business of accepting contributions to make contributions to other candidates. If they did, the system has that covered as an intermediary and it would have to be reported.

Lance Olson, of Olson Hagel & Fishburn LLP, addressed the Commission with a question regarding subdivision (b) and the establishing of a separate candidate support account. Mr. Olson was asking if the regulation as drafted precluded establishing more than one candidate support account within a committee, assuming the committee otherwise abided by the contribution limits overall. Currently the state Democratic Party has multiple candidate support bank accounts depending on whether is it supporting assembly candidates, senate candidates, or statewide candidates. The request would be that it would be permissible to have more than one as long as the contribution limits were not otherwise violated.

Mr. Olson said, regarding subdivision (c), that Ms. Boling's suggestion to split the check at point of entry is a good one. In any case, it may be better to allow thirty days, instead of fourteen days, to for the transfer to occur.

Commissioner Downey asked for Mr. Appelbaum's stance on that suggestion.

Mr. Appelbaum replied that from an enforcement stand point, as the election gets closer, the preference is that the money get separated out as early as possible. For most committees it is not an issue because the committees want as much money going to the candidate support in general as possible because that is money that can be used for all sorts of purposes.

Commissioner Downey asked if the thirty days would hinder the investigation in finding the sources.

Mr. Appelbaum said that it would not hinder the investigation.

Ms. Menchaca added that if the Commission goes with a time limit of anything other than fourteen days, staff would have to look at the regulation 18531, which currently says that if a contribution is returned within the fourteen days there would not be an over-the-limit contribution issue. Keeping the limit at fourteen days made the two regulations work hand in hand. That does not mean that staff cannot look at a longer time period, but both regulations would have to be reviewed.

Mr. Olson went on to subdivision (g) expressing concern with the way it is drafted. There are other types of committees such as small contributor committees and independent expenditure committees that do not make contributions over-the-limits. The regulation does not seem to include committees that do not have candidate support accounts. Another concern of Mr.

Olson's is whether subdivision (g) is authorized by Prop 34. He stated that the Democrats were the victim of the Republican Party's scheme to launder campaign contributions. There is already a law that precluded that, but it was not enforced. Subdivision (g) would not be needed if that law is enforced.

Chairman Randolph asked if there was any other public comment.

There was none.

Chairman Randolph summarized the main points for ease of discussion. One issue is allowing for more flexibility regarding splitting contributions from the initial deposit. Another issue is the naming of the committees. The first question pertains to requiring labels and that second is what that label should be. Whatever the decision, it should say "state candidate" rather than just "candidate." Another point is that subdivision (a) needs to be revised to be clear that the money can be used for things other than state candidate support. With subdivision (g), it needs to be clarified which committees are included. The Chairman asked if there were any other points to include.

Mr. Tocher replied that there were none.

Chairman Randolph asked if there were any other comments from staff.

Mr. Tocher asked whether Larry Woodlock should bring this item back as a pre-notice or notice discussion.

Chairman Randolph suggested another interested persons meeting to get specific thoughts.

Mr. Menchaca agreed and suggested making subdivision (g) a separate regulation altogether.

Commissioner Downey expressed that this was a very informative interested persons meeting and that there may not be any new information brought up. The debate on subdivision (g) will be the same whether it is separate of not.

Chairman Randolph made the decision to schedule another pre-notice and leave subdivision (g) in the regulation for that second pre-notice discussion.

Item #9. Adoption of Proposed Amendments to Regulations 18700, 18707, and 18708: Public Generally and Legally Required Participation as Affirmative Defenses to an Enforcement Action.

Emelyn Rodriguez, Legal Counsel, presented proposed amendments to regulations 18700, 18707, and 18708. This item was presented for pre-notice discussion at the October Commission meeting. At that time, staff was directed to notice the language presented. Since then there has been no public comment on this issue. Staff is now requesting that the Commission adopt the regulation as proposed by staff. This regulatory project deals with the last two steps of the eight step conflict of interest analysis. The changes proposed deal with public generally and legally

required participation as affirmative defenses to an enforcement proceeding. They are offered to clarify regulatory language reflecting the Commission's interpretation of sections 87101 and 87103. These exceptions allow otherwise disqualified public officials to take a role in a governmental decision if certain criteria are met. Ms. Rodriguez continued, since the late 1970s, the Commission has treated both public generally and the legally required participation as exceptions to the general rule regarding conflicts of interest. As explained in the memo, the primary distinction between treating public general or legally required participation as exceptions to the general rule, rather than as elements of an offense is the question of which party bears this burden of proof. Current regulations do not explicitly state which party has this burden. Furthermore, there have been no administrative law cases that specifically address this issue. Consequently, last year the Enforcement Division proposed these changes in order to provide guidance and to ensure that the Commission's interpretation would be clearly reflected in its regulations.

Ms. Rodriguez concluded that the proposed amendments would provide language clarifying the Commission's long standing interpretation of sections 87101 and 87103. The amendments would specify that in an Enforcement proceeding for a conflict of interest violation, it is the respondent's burden to establish that the public generally or legally required participation exceptions apply. Staff recommends that the Commission adopt the proposed clarifying amendments to regulations 18700, 18707, 18708.

Chairman Randolph asked for any questions or public comment on this item.

There was none.

Commissioner Downey moved to adopt the proposed regulatory amendments. Commissioner Blair seconded the motion. Commissioners Downey, Blair, Huguenin, Remy, and Chairman Randolph supported the motion, which carried a 5-0 vote.

Item #10. Adoption of Proposed Amendments to Regulations 18751, 18329.5, and 18701: Conflict of Interest Code Exemption.

Steven Russo, Senior Commission Counsel, addressed the Commission regarding the adoption of proposed amendments to regulations that are intended to provide greater procedural and substantive clarity to the process for granting an agency an exemption from having to adopt a conflict of interest code. As noted in the memo, and during the pre-notice discussion of this project in October, section 87300 requires every state and local government agency to adopt a conflict of interest code. However, very soon after the Act went into affect, the sweeping nature of this requirement proved problematic as it did not seem appropriate or reasonable for certain agencies, particularly those agencies that would exist for a very short period of time or which engaged in very little or no government decision making, to have to go through the laborious process of having to adopt a conflict of interest code. In 1976, the Commission adopted regulation 18751 to put into place a process by which state and multi-county agencies may apply to the FPPC to receive an exemption from having to adopt a conflict of interest code. Mr. Russo explained that the process currently in effect requires an agency to submit a written request to the Executive Director along with specified information about the agency. The Executive Director

must then approve or deny the request on certain specified grounds. Over time certain inadequacies in this exemption process have become apparent, creating problems for both staff and the regulated community concerning the application of this process. Perhaps the biggest problem is that the exemption process is now being largely bypassed in favor of other processes, such as the advice letter process or the code reviewing process. This is troublesome because these other processes were not designed to address the issue of whether an exemption should be granted and they don't carry with them the same procedural safeguards that the exemption process carries with it. Another problem with the current exemption process is that both the regulated community and agency staff have found the criteria for granting an exemption, set forth in 18751, are rather confusing so it sometimes difficult to determine when the criteria have actually been satisfied. Another problem is that certain agencies, having only an advisory function and therefore seemingly most deserving of an exemption, are not expressly stated in the regulation to be eligible for an exemption. Finally, the exemption process contains certain procedural gaps that make application of the process problematic. It is in light of these problems that staff proposes these amendments in order to improve the process by which agencies may be exempted from the requirement of adopting a conflict of interest code. Stated simply, the proposed changes to regulation 18751 would more firmly establish the exemption process as the exclusive means by which an agency is to be absolved of the duty under section 87300 of the Act to adopt a conflict of interest code.

Chairman Randolph suggested moving on to the two decision points, having discussed the structure of the regulations previously.

Mr. Russo explained that both of the decision points concern the criteria set forth in regulation 18751 for granting an exemption from adopting a conflict of interest code. This regulation currently sets forth four criteria, any of which may serve as the basis for granting an agency an exemption from adopting a code. Focusing on the first decision point in regulation 18751, subdivision (c), currently the provision provides that the Executive Director shall approve an exemption for an agency that soon will be inoperative or nonfunctioning. At Decision Point 1 the Commission is asked to decide whether the current language of the criterion should remain in place with the word "soon" or the word "soon" should be replaced with a specific period of time of one year. Staff is recommending that the one year time period be adopted, as it provides greater clarity to the process and the one year period seems like a good time interval given that an agency can take up to six months to adopt a conflict of interest code. This way, the agency would have a code in affect for at least six months.

Chairman Randolph asked if there were any objections to that recommendation.

There were no objections.

Mr. Russo moved on to Decision Point 2, which deals with the final criterion for granting an exemption under the current regulation. Regulation 18751(e)(4) presently provides that even if an agency does not satisfy any of the other specified criteria for being granted an exemption, the Executive Director may grant an exemption on an unspecified case by case basis. At Decision Point 2 the Commission is presented with the option to eliminate this criterion entirely or to adopt, as an alternative, a redrafted version which allows the Executive Director to grant an

exemption to an agency not satisfying any of the other criteria but only if the Executive Director finds that "good cause exists for granting an exemption due to extraordinary circumstances which indicate the burden on the agency of adopting a conflict of interest code is not warranted by the degree of likelihood that a conflict of interest may occur." Mr. Russo continued that under this option a provision is also proposed to be added to a renumbered subdivision (j) requiring that when an exemption is granted under this criterion, the letter granting the exemption shall describe the particular extraordinary circumstances that warrant the granting of an exemption. Staff is recommending adopting of the second option, as it insures that the Executive Director will retain flexibility to grant an exemption under extraordinary circumstances, yet restricts that flexibility to those extraordinary circumstances which constitute good cause and when that good cause can be articulated in an exemption letter.

Chairman Randolph confirmed that the idea is to allow for other extraordinary circumstances that still meet the basic policy behind not being required to adopt a code; the Executive Director can grant the exemption request.

Mr. Russo said that is correct. When the regulation was being redrafted, the focus was the purpose of having a code in the first place. Therefore, if the agency does not fit any of the other criteria but it is extremely unlikely that it would make any decisions that would constitute a conflict of interest, then the Executive Director could exercise good judgment and grant the exemption under that circumstance.

Chairman Randolph asked if there were any questions or concerns from the Commission on that decision point.

Commissioner Remy asked if there had to be a request from the agency for the exemption, or if the Executive Director can decide to make the agency exemption unilaterally.

Mr. Russo replied that the intention of the regulation is to integrate that exemption process with the current code reviewing process. Staff will become aware that a new task force or agency is coming into existence and will proactively reach out to that agency and find out if it is going to adopt a conflict of interest code or if it will be part of another agency's code so that the necessary steps are taken to make sure this duty is not overlooked. In the course of doing so, there will be discussions and a determination will be made that the agency does not have decision making authority, and therefore, should not have a conflict of interest code. What this would allow staff to do is affirmatively send a letter out from the Executive Director that says that staff has looked at this and thinks the agency should be granted an exemption and why, and explain when that exemption expires.

Chairman Randolph interjected with an example of when the Secretary of State formed the e-filing task force it was very obvious that it would not be an entity subject to being required to file a code. This would enable staff to inform the agency that the code is not a requirement and keep the agency from having to go through the trouble of obtaining this information on their own.

Luisa Menchaca, General Counsel, added that another advantage is that the Executive Director has the opportunity to make new agencies aware that a code is not required, and therefore, the agency does not have an immediate filing obligation.

Chairman Randolph asked if there were any other questions.

There were none.

Scott Hallabrin, of the Assembly Ethics Committee, made a suggestion regarding line 8 on page 2 of regulation 18751, that the word "or" be inserted at the end.

Commissioner Blair moved to adopt the staff recommendations and Mr. Hallabrin's suggestion. Commissioner Downey seconded the motion which passed with a 5-0 vote.

Item #11. Draft Request for an Advisory Opinion from the Federal Election Commission Regarding Preemption of State Rules for Reporting Mixed Expenditures by Political Party Committees on Federal and State or Local Elections.

Larry Woodlock, Senior Commission Counsel, presented a draft letter to the Federal Election Commission (FEC) asking for an opinion on possible federal preemption of a state regulation governing the disclosure of receipts and expenditures by a political party committee used to fund mixed federal and state election activities. In May a regulation was proposed regarding this matter but discussion was suspended until an FEC advisory opinion was obtained. Last month the proposal and the opinion were discussed again and it was requested that the letter to the FEC be more specific. The draft presented is more specific and staff is requesting that Commission approve the new draft of the letter to be sent of for advisory opinion.

Chairman Randolph stated that the new draft of the letter was done well and asked for any other comments from the Commission regarding the new draft.

There was none.

Chairman Randolph opened the discussion to any public comment.

Ms. Boling agreed that there is a state interest in the reporting of the true expenditures in support of state candidates and state ballot measures. The public, in reading a disclosure of a political party committee, should have every expectation of being able to look in there and see how much money was spent on behalf or in support of a candidate. However, since that specifically is what is in the public's interest, it can be shown on schedule D because that is the piece that really does show what has been spent.

Ms. Boling also added, regarding the draft letter, that her original request for advice was really only about candidate and ballot measure support. It was not about allocating rent, staff salaries, and all of the overhead that has been allocated based on the federal requirement for years. It does not seem likely that it will be possible to figure out how much of the rent is state and how much is federal, and one breakdown is just as good as another.

Mr. Woodlock responded to Ms. Boling's comments by saying that staff has no intention of looking into allocations rules for rent and overhead, in fact, subdivision (g) of the regulation specifically provides that any reasonable method of accounting is fine for those types of expenditures. Going back to the issue regarding the sources of the money; it is important to know that a quantum of money is spent on a given proposition or candidate but it is no less important to know where that money came from. Staff is interested in the information and there seems to be equal state interest in knowing what money was spent as well as where the money came from. The Commission understands that there is a burden in having to re-report information that was reported to the federal government but that does not bar the state from having the information. What the treasurers are suggesting is that the burden of getting that information be moved to the people who are looking for it. The question is not eliminating the burden; the question is who should be responsible for reporting that information. Staff believes that it makes the most sense to have the treasurer report the expenditures, the same person who reports it to the federal government, so that everyone else does not have to repeat that process.

Chairman Randolph asked for any other comments on this item.

Lance Olson, California Democratic Party, said that it is likely that the result of the draft letter is going to be that the state is preempted and the disclosure of expenditures and receipts by federal candidates and political committees can be done on schedule D. However, trying to go back and find out the original donors and then disclosing those donors is what is being objected to.

Mr. Woodlock replied that the question of preemption is not as simple as the parties suggest. A few years ago in the most recent full discussion in an FEC advice letter of preemption there were six commissioners who broke three ways, in groups of two. There are two kinds of preemption discussed. The first is field preemption, which means any attempt to regulate in any way in a given field is automatically preempted. In other words, with field preemption one cannot regulate in the area at all. Then there is conflict preemption where one can regulate in an area as long as the state rule does not conflict with a federal rule. The commissioners at the time were split in a way that two of them believed that the state could not regulate at all. The other four commissioners did not agree and looked at conflict preemption. Two of them found that the state rule at issue did alter the obligations of the federal candidate on the federal reports, and therefore, was preempted. The other two commissioners recognized that same point but did not think that the conflict was strong enough to merit preemption. What needs to be considered is how many of the current commissioners still believe in field preemption. Field preemption is really what Mr. Olson and Mr. Bell are suggesting is now the rule but that is uncertain. The rule was written so that it would not conflict with the federal law because it would not limit the rights and obligations of a federal candidate in any way. All staff is asking is that when activities have to be reported to the state, it needs to be done under state rules. That does not require any altering of practices under federal law. There is a good chance that the Commission will win this preemption argument.

Commissioner Downey added that all that is really being decided today is whether to send off this letter. The debate regarding the substance of the regulation is not timely at the moment. The letter should still be sent.

Chairman Randolph asked if there was any other public comment.

Mr. Bell noted that this is a difficult topic but the suggestion is to send the letter. The schedule D disclosure would be useful and appropriate. If the letter is going to be sent, there may be additional comments made to the FEC by the Republican Party, not to try and knock this Commission or its authority, but there is strong feeling about this issue. There is no objection to the letter being sent.

Chairman Randolph asked for any other public comment on this item.

There was none.

Chairman Randolph asked if there was any objection from the Commissioners to sending the letter.

There was none.

The meeting adjourned for lunch 12:00 pm.

The meeting reconvened at 1:45 pm

Item #12. Approval of the 2006 Regulatory Priorities

John Wallace, Assistant General Counsel, noted some additional items added to the stand by list because of staff changes and projects that were added to the calendar.

Chairman Randolph asked for any questions.

There were none.

Chairman Randolph stated that the 2006 Regulatory Priorities have been approved and will come back for updates on a quarterly basis.

Item #13. Approval of Revised Statement of Economic Interests Forms and Instructions for 2005/06.

Carla Wardlow, Chief of Technical Assistance, noted a suggested change by Los Angeles County to the cover page in part 3 to say "check the appropriate box" instead on "check at least on box."

Commissioner Downey asked is it is possible to need to check more than one box.

Ms. Wardlow replied that there are cases in which one would need to check more than one box.

Chairman Randolph suggested staying with the current language so as not to imply that only one box can be checked.

Ms. Wardlow agreed with the Commission and requested the approval of this item.

Chairman Randolph asked for any public comment.

There was none.

Commissioner Blair commented on the appearance on the form being outdated.

Chairman Randolph responded that the appearance is something that can be reviewed in the future.

Commissioner Remy asked how often the dollar categories are reviewed and when the last time they were changed was.

Ms. Wardlow replied that the dollar amounts and categories were changed recently when the "investments up to $1,000,000" and "income over $100,000" categories were added. Those are statutory so any changes there would require legislation.

Mark Krausse, Executive Director, added that there are four bills pending right now that would increase some of the thresholds.

Chairman Randolph asked for any public comment on this item.

There was none.

Commissioner Downey moved to approve this item. Commissioner Blair seconded that motion, which passed with a 5-0 vote.

Item #14. Proposed Strategic Plan.

Mr. Krausse addressed the Commission with a question regarding what term this plan would be for. The term in mind was a four year term. Another question was whether or not it would be a good idea to include the quarterly updates on the regulatory work plan in the Executive Director's Report. Lastly, regarding the memo, it was suggested by Commissioner Remy that the description of the existing budget as survival is most likely not appropriate and well below survival. Each of the descriptors could be changed.

Chairman Randolph asked if there were any comments on this item.

Commissioner Remy reiterated the Mr. Krausse's comments on the description of the existing budget of survival meets only the minimum expectations. The ideal budget did not seem adequate to the current workload. It seems that the initial level is unacceptable for the Commission and the debate should be between an enhanced program and one that meets

minimum expectation. The language should be phrased in the context. Commissioner Remy began with goal A on number 3, suggesting some sort of timeframe for acceptable wait time. Secondly, in all the goals where the word "seek" is used, it may be more appropriate to say "increase" or "obtain." The goal is to increase the numbers, not seek to do so. Last, number 5(b) in goal A seems like an obscure goal and could be more precise.

Mr. Krausse stated that the objective is to make such an improvement that it is easier to use.

Commissioner Remy agreed that the goal is a good one, but that phrasing the language differently may make it easier for people to understand. Another suggestion might be to, under goal C, number 3, say "establish statutory funding levels to insure adequate support for required workload."

Mr. Krausse added that a portion of the funding, about forty percent, is non-statutory Budget Act funding and about sixty percent is in the Political Reform Act. Therefore, if the Legislature in the course of enacting a budget wants to reduce that statutory portion, it would have to make a finding that it furthers the purposes of the Act. Finance sees that Budget Act money as somewhat at its disposal and can reduce it as much as it would like. The idea is to move that portion to the statutory portion. That can be reworded to make more sense.

Commissioner Blair suggested ended the sentence at the word "statutory" instead.

Commissioner Remy agreed.

Chairman Randolph interjected that the language proposed by Commissioner Remy is preferable.

Chairman Randolph asked for any other questions for public comment.

There was none.

Chairman Randolph suggested approving the plan based on Commissioner Remy's changes.

Commissioner Huguenin asked how often this plan is revisited and if changes to the plan are difficult to make.

Mr. Krausse explained that the plan is essentially a list of things to do and once it is approved, it gets put into a spread sheet and projects are assigned from it.

Chairman Randolph added that a good way to approach it may be have regular reports in the Executive Director's Report and also have an annual review.

Commissioner Remy said that the Commissioners should be available to assist with the monitoring of the plan as well as the staff.

Chairman Randolph agreed with the idea of using the Commissioners help.

Commissioner Blair asked, about the wait time when one calls in.

Mr. Krausse explained that callers, once they have gone through the phone tree, usually get a live person right away. The only time that is not the case is during times surrounding deadlines when even adding extra staff may not relieve all of the wait time.

Chairman Randolph asked what a logical wait time would be.

Mr. Krausse replied that a four minute wait time would be an acceptable target, outside of the deadline times.

Commissioner Remy asked if there are performance indicators that can be used as mechanisms for tracking the performances to see how they measure up with objectives.

Mr. Krausse explained that the standard state form is the existing evaluation of performance at every level.

Chairman Randolph added that many of the items in the strategic plan lend themselves to that and we do not have a good grasp on how many person hours are spent on various tasks and how long cases take. Getting some of the assessment tools would help with that.

Chairman Randolph asked for any other questions or comments.

Commissioner Blair moved to approve the plan as amended. Commissioner Huguenin seconded that motion which passed with a 5-0 vote.

Item #15. Legislative Report.

Nothing new to report.

Item #16. Executive Director's Report.

Mr. Krausse reported that a new item that was approved by the Department of Finance for $168,000 for SB 8, the revolving door provision.

Commissioner Remy asked how Soto's bill affects local ethics committees and if they will have a role there.

Mr. Krausse answered that most local ethics committees have adopted the Political Reform Act and then done whatever overlay to that they like. The law is a state law.

Commissioner Remy wondered if someone like the City of Los Angeles takes seriously the revolving door ban issues, would the Commission have any role in that city.

Mr. Krausse replied that according to law the Commission would be enforcing the Act.

Chairman Randolph introduced Chris Espinosa, the Executive Fellow, and welcomed him.

Mr. Krausse added that Scott Tocher is going to be very missed when he leaves the agency.

Chairman Randolph wished Mr. Tocher the best.

Item #17. Litigation Report.

Luisa Menchaca reported that there was nothing to add.

Chairman Randolph adjourned the meeting to closed session.

Closed session ended at 2:21 p.m.

Chairman Randolph reported that no reportable action was taken in this meeting.

The meeting adjourned at 2:30 p.m.

Dated: December 1, 2005

Respectfully submitted,

_____
Kelly Nelson
Commission Assistant

Approved by:

_____
Liane Randolph
Chairman